



DISCUSSION PAPER 174

THE RIGHT TO A FAIR TRIAL – THE NEED TO OBVIATE DELAYS

PROJECT 151: THE REVIEW OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 (A SUB-PROJECT OF THE REVIEW OF THE CRIMINAL JUSTICE SYSTEM)

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INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973.

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EXECUTIVE SUMMARY

1 This paper focuses on the causes of unreasonable delays in the finalisation of criminal cases in South African courts. Unreasonable delays have been a persistent problem in our courts despite legislative steps taken by the South African Parliament to prevent and eliminate delays in the finalisation of criminal trials.

2 A study of reported criminal cases country-wide makes it abundantly clear that unreasonable delays in the criminal courts persist. The purpose of this research paper is to investigate the root causes of unreasonable delays in criminal trials.

3 Section 342A of the Criminal Procedure Act , 51 of 1977 was enacted to eliminate unreasonable delays in criminal trials. This research paper found that this piece of legislation is a robust tool to deal with unreasonable delays, however, there is a problem in this piece of legislation being that there is currently no effective sanction for non-compliance by parties to a criminal trial who are responsible for causing unnecessary delays in the finalisation of criminal trials.

4 Although Section 342A(3) makes provision for costs orders against the party causing unreasonable delay in the finalisation of criminal cases, this provision has never been brought into effect .This piece of legislation, if it were to be brought into effect, would help to reduce or eliminate the so-called Stalingrad tactics used by powerful parties to criminal trials with financial muscles to prolong criminal trials and avoid serving time in jail for the offences that they committed.

5 This research paper found that the main cause of unreasonable delays among others are, but not exhaustive, the following:

- Stalingrad tactics.
- Systemic causes.
- Failure to hold pre-trial proceedings to curtail the proceedings.
- Interlocutory applications.

6 In order to eliminate unreasonable delays, this research paper recommend that the following steps should be implemented:

7 That the following new sections be incorporated into section 342A namely:

- New section 342B-which provides for the accused to plead to the charge within three months of his or her first appearance.
- New section342C -which provides that no criminal case shall be postponed for more than three times without judicial inquiry. The section further prohibits the pausing or stopping of a criminal trial by virtue of any application brought by any party to a criminal trial in the absence of substantial and compelling circumstances .
- New section 342D- the purpose of this section is to avoid unnecessary lengthy period of postponement and incarceration while awaiting trial , a postponement of a case for trial or investigation or finalisation may not be for more than three months .
- New section 342F-provides for the establishment of a case management forum chaired by the head of that court to oversee the implementation of case flow management . Robust case management is a powerful tool to reduce or eliminate delays in the criminal courts .
- New section342G-which provides that at any judicial case management conference or inquiry for a speedy finalisation of criminal trials the judicial officer shall explore factors that may enhance the speedy finalisation of the criminal trial .
- Section 342H- this section provides for a sanction against a party at any judicial case management who frustrates the objectives of the judicial case management .
- New section 343-which provides for case progression and management which require that criminal trials must be dealt with efficiently and expeditiously.

CHAPTER 1: THE EFFECTIVENESS OR OTHERWISE OF SECTION 342(A)

A Introduction

1.1 The legal maxim “**justice delayed is justice denied**” emphasises the importance of timeous resolution in legal matters. The origin of the maxim is believed to have originated from the *Magna Carta*.¹ The idea is that excessive delays in legal proceedings has a negative effect to those who seek justice.

1.2 For the accused, a delay in finalising his or her trial means languishing in prison for months or even years awaiting trial. This is a clear violation of the right to a fair trial which is entrenched in the Constitution of the Republic of South Africa.

1.3 For the witnesses, a delay in finalising the matter might lead to the witness or witnesses losing confidence in the administration of justice. Witnesses might die before testifying. Witnesses might relocate to far areas and thus making it difficult or impossible to trace them. All these factors cause huge delays in the finalisation of criminal trials.

1.4 For the courts, any form of delay will undoubtedly lead to congested court rolls. Any form of delay has a negative effect on all stakeholders.

B Constitutional Mechanism to Address Delays in the Criminal Courts in South Africa and Other Jurisdictions

1.5 The Constitution of the Republic of South Africa contains a Bill of Rights.² The Constitution gives every accused person a right to a fair trial, which includes the right to

¹ Clause 40 of the magna carta.

² Chapter 2 Act 108 of 1996.

have a trial begin and conclude without unreasonable delay.³ This right is a fundamental aspect of a fair trial. This right also protects the accused's liberty and personal security.

1.6 An extract of Fundamental Rights and Freedoms from the Constitutions of the Southern African States reveals that the Republic of Namibia has a somewhat similar provision.⁴ In Namibia a trial shall (not may) take place within a reasonable time, failing which the accused **shall be released**.

1.7 According to a decision of the **Namibian** High Court, the effect of article 12(1)(b) was intended to mean release from arrest and from the onerous conditions of bail.⁵ According to the court the word "**release**" shall not be given the meaning of "**acquit**".⁶

1.8 In **Canada**, any persons charged with any offence has the right to be tried within a **reasonable time**.⁷

1.9 **Chapter 3 of the Bill of rights** and the other constitutions mentioned above do not go as far as explaining what is meant by "**without unreasonable delay**". The Namibian Constitution is also quiet on the meaning of "**within a reasonable time**". **The Canadian** charter is also quiet on this aspect.

1.10 The **Canadian Supreme Court**⁸ rejected the framework traditionally used to determine whether an accused was tried within a reasonable time under Section 11(b) of the charter of Rights and Freedoms. The court replaced the traditional framework with the concept of **delay ceilings**. Delay ceilings refer to presumptive time limits for criminal trials set by the courts beyond which a trial is presumed to be an unreasonable delay, violating the accused's charter rights, unless exceptional circumstances justified the delay. These ceilings help to ensure that trials happen in a timely manner, balancing the accused's right to a speedy trial. The court ruled that for matters tried in a provincial court

³ Section 35(3)(d) Act 108 of 1998.

⁴ Article 12(1)(b) of the Namibian Constitution.

⁵ *Hendrik Muller Van As and Another v The State* case number A267/99 delivered on 14 December 2000.

⁶ See *State v Strowitski* 1995 (1) BCLR 12 (NM) delivered 12 April 1994.

⁷ Section 11(b) of the Canadian Charter of Rights and Freedoms.

⁸ *R v Jordan*, 2016 SCC 27 at paras 46, 49-50.

without preliminary hearing, the presumptive ceiling is **18 months** and for matters tried in superior courts, or provincial courts with a **preliminary hearing**, the presumptive ceiling is **30 months**.

C The Vehicle Giving Practical Effect to Section 35(3)(D) of the South African Constitution

1.11 The South African Constitutional Court⁹ said that the vehicle giving practical application to Section 35(3)(d), the right to have a trial begin and conclude without delay, is Section 342(A). The Constitution itself does not give the practical application of Section 35(3)(d).

1.12 A holistic reading of Section 342(A) requires that the court do the following:

- (i) Investigation of the cause(s) of the delay in the finalisation of the case, while considering the listed factors.¹⁰
- (ii) The court must make a finding whether the delay is reasonable or unreasonable.¹¹ The court may also struck the matter off the roll provided there is no plea .Where there is a not guilty plea and the State or defence is unable to proceed or refuses to close its case, the court has the power to continue with the proceedings as if the cases for the State or defence as the case maybe, have been closed .The court has a powerful tool to stamp out unreasonable delays.
- (iii) Depending on the stage of the proceedings, the court must apply the remedies provided.¹²

1.13 The phrase in Section 342(A)(3) to **the effect that the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice** arising from **it**, shows that the court is given wide powers to eliminate the causes of the delay.

⁹ *S v Ramabele and Others* 2020 (2) SACR 604 at para 57.

¹⁰ Section 342A(1) Act 51 of 1977.

¹¹ Section 342A(2) Act 51 of 1977.

¹² Section 342(A) Act 51 of 1977.

This requires the court to exercise a firm judicial hand to eliminate unreasonable delay in having the case started and concluded without undue delay.

D Effective Sanction For Non-Compliance With Court Orders

1.14 There is currently no effective sanction for non-compliance on the part of participants who do not comply with court orders or an unjustified failure on the part of participants to attend court when required to do so. An example would be a practitioner with whom a trial date was arranged. A failure on his or her part to appear in court on the date arranged for trial will not attract any sanction by the court. Section 342A of the Criminal Procedure Act provides that a court before which criminal proceedings are pending shall investigate any delays in the completion of criminal proceedings, which appear to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal representative. Section 342A(e) provides for costs orders against the prosecution or defence for causing delay, however, this section has never been brought into force. The only step that may be taken against a legal practitioner is to refer him or her for disciplinary action by the appropriate professional body.

CHAPTER 2: THE EMPLOYMENT OF STALINGRAD TACTICS AS A FORM OF DELAYING TACTIC

A Introduction

2.1 In recent high-profile criminal trials, we have witnessed new forms of delaying tactics. The accused, usually very powerful and financially well-off individuals, use prolonged and repeated litigation to delay the commencement of trials. The accused will appeal each and every unfavourable ruling, regardless of whether there are merits in the envisaged appeal. The aim is to delay the commencement or finalisation of the case. This strategy is named after the prolonged World War II battle of Stalingrad.

2.2 As already mentioned, the Constitution of the Republic of South Africa¹³ requires that criminal matters begin and conclude without undue delay. Any form of delaying tactics will be flying in the face of this constitutional imperative.

B Detailed Breakdown of Stalingrad Tactics

1 Wear-Down Tactics

2.3 The defence or the accused, knowing fully well that he or she has a weak case, will launch a vigorous fight by making numerous pre-trial interlocutory applications. The aim thereof is to ensure that the starting or finalisation of the trial should be delayed as much as possible.¹⁴

2.4 Stalingrad tactics may also be used in the middle of a trial. The defence will usually bring numerous objections and appeal unfavourable rulings well aware that there is no merit in the envisaged appeals or objections. The aim is to frustrate the trial process.

¹³ Section 35(3)(d) Act 108 of 1996.

¹⁴ *Zuma v Downer and Another* 2024(2) SA 356 (SCA).

In the middle of a trial, the accused may apply for the recusal of the presiding officer well aware that there is no merit in his or her application.

2 Stalingrad is Tantamount to An Abuse of The Court Processes

2.5 The Supreme Court of Appeal¹⁵ stated that it is an abuse of the court process for the accused to institute proceedings that are obviously unsustainable. The court referred to the private prosecution brought by former President Zuma as not having real questions of law involved. The court said that the private prosecution was part of the Stalingrad strategy of Mr Zuma.¹⁶

C The Impact Of Stalingrad

2.6 Stalingrad has profound impact in the administration of justice.

1 On Ordinary Citizens

- Stalingrad erodes the confidence of the public in the administration of justice.
- While the case is dragging long before reaching the doors of the trial court, crucial witnesses might die resulting in an otherwise guilty person avoiding justice.
- While Stalingrad is raising its ugly head, crucial witnesses might have moved away to other areas. While still tracing witnesses, the commencement of the main trial might be delayed for a long period to the dismay and frustration of all who seek swift justice.

¹⁵ *Zuma v Downer & Another* (Supra) at para 28.

¹⁶ *Zuma v Downer & Another* (Supra) at para 28.

2 On The Court System

- Stalingrad has the effect that results in cases of greater complexity, which are truly deserving of the attention of the court, competing for a place on the court roll with a case which is not truly deserving.¹⁷
- The Constitutional Court noted that the former President's Stalingrad defence strategy costed the State a huge sum of money.¹⁸

3 Measures Necessary to Counter Stalingrad Tactics and to Obviate Delays

2.7 Our courts do have powers to curb Stalingrad tactics. The Criminal Procedure Act gives the court wide ranging powers to make any order the court may deem fit to eliminate the delay and prejudice arising from Stalingrad .¹⁹All that is needed is a firm judicial hand to stamp out delays in whatever form Stalingrad raises its ugly head. The Supreme Court of Appeal²⁰ said that the Superior Courts had the inherent power to regulate its own processes and to stop frivolous and vexatious proceedings. The High Court sitting in Johannesburg recently stated that the court can exercise its inherent power to prevent the abuse of its processes by frivolous and vexatious proceedings.

2.8 The Constitution also give the Superior Courts from the level of the High Court up to the level of the Constitutional Court inherent powers to protect and regulate their own processes.²¹ Our courts have sufficient powers to prevent Stalingrad delaying tactics. All what is needed is a firm judicial hand. In order to give effect to Section 35(3)(d) of the Constitution, the following measures are recommended.

¹⁷ *Zuma v Downer & Another* (Supra) at para 22.

¹⁸ *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) delivered on 5 October 2012.

¹⁹ Section 342A(3) Act 51 of 1977.

²⁰ *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* 2021 (4) SA 131 (SCA) delivered 18 November 2019 at para 25.

²¹ Section 173 Act 108 of 1996.

(a) Imposition Of Punitive Costs Including Costs De Bonis Propriis

2.9 The High Court²² ordered the respondents to pay costs of an attorney and own client. This will deter the employment of Stalingrad tactics. Where the accused are or is represented by the State, the accused must be ordered to pay the costs personally. This will discourage the accused to employ Stalingrad tactics.

(b) Scrutinising the Reasons For Interlocutory Appeals Causing Delays

2.10 A court may scrutinise the reasons for interlocutory appeals which might mean that the main case will stand down pending the finalisation of interlocutory appeals or review.²³ This research paper has, in the new proposed Section 342C in Chapter 7, recommended measures dealing with appealing interlocutory applications.

(c) Time Limits For Finalising Cases

2.11 In some jurisdictions time limits for the finalisation of cases are fixed. The **Supreme Court of Canada**²⁴ indicates a fixed 18 months to finalise a case heard in a provincial court without preliminary hearing and 30 months for a case tried in the superior courts or provincial courts with preliminary hearing. This research paper is recommending in the proposed new Section 342B in Chapter 7 that an accused person must plead to the charge within three months from the date of first appearance in the Magistrate's Court and that the criminal matter must be finalised within six months after pleading to the charge.

(d) Early Dismissals Of Frivolous Appeals

2.12 A court should dismiss interlocutory appeals which are clearly meritless. The court has the power to dismiss frivolous applications which are clearly intended to delay the proceedings.

²² *Maughn v Zuma and Others* 2023 (5) SA 467 (KZP) delivered 7 June 2023.

²³ *S v Zonke and Others* (CC30/15)(2023).

²⁴ *R v Jordan* 2016 SCC 27.

(e) *Interdicting And Restraining Orders*

2.13 The court may interdict the accused. The High Court ²⁵interdicted former President Zuma and restrained him from re-instituting further interlocutory proceedings.

²⁵ *Maughn v Zuma* (Supra) at para 198.

CHAPTER 3: SYSTEMIC CAUSES OF DELAY

A Introduction

3.1 Systemic causes of delay in South African court proceedings often stem from resource limitations within the State. This often leads to backlogs and congestion. These delays may still infringe on the rights of the accused. The court must still investigate unreasonable delays and take steps to eliminate systemic delays.

3.2 The Constitutional Court ²⁶said that the systemic factors are probably more excusable than cases of individual dereliction of duty. The court further said that there must come a time when systemic causes can no longer be regarded as exculpatory. The court has powers to ensure that the delay is eliminated.

3.3 Considering the backlogged South African criminal justice system, systemic factors, such as financial constraints / resource limitations and forensic backlogs often inhibit the right of an accused to receive a speedy trial.

3.4 Examples of systematic delays include the non-availability of a State advocate, prisoners not brought on time, warrants of detention not completed properly and ineffective communication between the registrar's office/clerks of the courts and the Department of Correctional Services.²⁷

B Power Failure

3.5 It happens frequently that trials are postponed due to power failure. At most courts, especially in the lower courts, there are no alternative sources of generating power. Once there is no electricity, all cases are postponed. The reason for the postponement is usually that the recording machines cannot function without electricity.

²⁶ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 para 35 delivered 2 December 1997.

²⁷ *S v Motsasi* 1998 (2) SACR 35 (W) and *S v Van der Vyver* 2007 (1) SACR 69 (C).

This also causes delays in the finalisation of criminal trials .This may not necessarily be cured by legislation, instead it may have to be dealt with administratively.

C Lack of Water

3.6 It frequently happens that the courthouse does not have water. Usually, the toilets are locked due to a lack of water. All cases are usually remanded due to a lack of water in the courthouse. Witnesses and accused persons will have to return to court on another day. This also causes delays in the finalisation of criminal trials. This may be cured administratively.

D Underutilisation of the Official Court Time

3.7 In the lower courts, the official court time is 9h00 to 16h00. It happens frequently, but not in all courts, that some courts normally start court proceedings any time after 10h00. More than one hour of the court's time is lost by the time the court starts. The times allocated for tea breaks and lunch are usually exceeded. This may have to be dealt with administratively.

E Unavailability of Presiding Officers or Prosecutors

3.8 It happens frequently that trials are unable to proceed due to the unavailability of the presiding officer or prosecutor. This happens usually in the lower courts. Courts are usually combined for postponement purposes .This may be dealt with administratively rather than by legislation.

F Delays Caused by Accused Persons and Legal Representatives

3.9 In the matter of **S v Dalindyebo**,²⁸ a number of years had passed between the commission of the alleged offences and the commencement of the trial.

3.10 The court noted that much, if not all, of the delay was caused by the appellant. His obstructive behaviour included:

- a) intimidation of witnesses,
- b) 34 postponements at the instance of the appellant, and
- c) multiple legal representatives.

3.11 It is, however, clear from the judgment that an accused will not be able to abuse such delay in the process in order to construct a platform from which to attack the fairness of the process, including the trial itself.

3.12 In the matter of **S v Zulu**,²⁹ the three-year delay in the matter can almost exclusively be attributed to the accused and his legal representative.

3.13 The delays were categorised by repeated termination of the appointed legal representatives. First, the three Legal Aid SA representatives, then the Judicare-appointed legal representative and then private counsel. The court noted that the code of conduct for Legal Practitioners faces a mandatory, positive obligation upon legal practitioners to maintain the highest standards of honesty and integrity; uphold the Constitution, and the principles and values enshrined in the Constitution; and honour any undertaking given by them in the course of their business or practices.

3.14 The court observed at paragraphs 35, 37 and 40 that:

"A practitioner like Mr Mamba is obliged to treat the interests of their clients as paramount, provided that their conduct shall be subject always to their duty to the court, the interests of justice, observance of the law, and the maintenance of the

²⁸ *S v Dalindyebo* 2016 (1) SACR 329 (SCA).

²⁹ *S v Zulu* 2023 (1) SACR 343 (MM).

ethical standards prescribed by this code, and any ethical standards generally recognised by the profession.

[37] Mr Mamba's conduct, by failing to attend, alternatively continuously being in such ill health that he was unable to attend court and execute his obligation and duties towards the accused and the court, offends the code of conduct.

[40] The conduct displayed by Mr Mamba in this matter is concerning and warrants a referral to the Legal Practice Council. The Legal Practice Council ought to investigate and consider, and for this purpose this judgment will be made available to the Legal Practice Council, together with a copy of the court file."

3.15 It is the responsibility of the legal practitioner to ensure that the constitutional rights of accused persons are protected and that the accused persons are treated fairly and not unduly prejudiced by the State.

3.16 Although Section 342A is a powerful tool used to expedite the finalisation of criminal trials, a robust case management system could be a possible cure to the problem of unreasonable delays.

3.17 Case law mentioned earlier reiterates that accused persons should steer clear from causing unreasonable delays and recalcitrant lawyers must be disciplined.

3.18 It is a matter of the courts taking a strong and focused stance against unreasonable delays that serve only to undermine the rule of law.

G Pre-and Post – Conviction Delay

3.19 The Constitutional court in ***S v Dzukuda*** and Others³⁰ discussed the issue of pre- and post-conviction delay as follows:

- The court stated that trial interest, liberty and security were interests that had to be protected in pre-conviction delay. This means that trial-related prejudice had to be considered when postponing the matter several times.
- An example of trial-related prejudice is witnesses being unavailable to attend court and subsequently having fading memories as significant time has lapsed.

³⁰ *S v Dzukuda and Others* 2000 (4) SA 1078 (CC).

- In terms of liberty and security, the court stated that when a matter is postponed several times the final judgement is delayed. Because of this the accused is subjected to stigmatisation of having committed the crime by members of society, despite being presumed innocent until proven guilty.

3.20 Ackermann J observed the Institutional delay from paras 50 onwards of the ***Dzukuda and Others*** judgment as follows:

[50]The High Court found that -

“... the inevitable institutional delay created by section 52 of the Criminal Law Amendment Act 105 of 1997 (The Act) is an infringement of the right to a trial that begins and concludes without unreasonable delay [as guaranteed by section 35(3)(d) of the Constitution].”

Lewis J came to this conclusion because -

(a) a full record of the proceedings (including a transcript of the evidence) has to be prepared and forwarded to the High Court;

(b) the provisions of section 51(3)(b) are often invoked and the reasons for conviction requested from the regional magistrate; this has occurred in 44 per cent of the cases referred to the Witwatersrand High Court and in all such cases heard by Lewis J;

(c) it is the general experience (in the Witwatersrand High Court I presume) that those reasons are not furnished within the period set by the High Court, necessitating a further postponement;

(d) there is the inevitable further delay caused by the fragmented process:

“The accused must wait, in prison, not knowing whether his conviction might be set aside, or whether he faces a sentence of life imprisonment or a lesser sentence. The anxiety, uncertainty and frustration that is experienced must be enormous. It is no answer to say that he has already been convicted; that he faces life imprisonment, and that the delay can make no difference. Even a convicted person is entitled to be treated humanely, and in such a way that his dignity is not unduly impaired”;

(e) the final outcome of the case will be even further delayed if the accused wishes to appeal;

(f) the present uncertainty as to the correct appeal forum can only add to the uncertainty and delay that is inflicted on the accused.

[51] A few general comments are necessary.

The task of deciding whether the right to a fair trial has been limited by unreasonable delay rests, of course, with the courts; it is, however, for the

applicants to prove the facts upon which they rely for the claim of infringement of this right in the present case.

The High Court failed to consider the substantial qualitative difference between a delay which occurs before a conviction and one that takes place afterwards.

It also omitted to distinguish between the breach of this element of the fair trial right in respect of a particular trial and declaring a statutory provision invalid because it renders such breach inevitable in relation to all trials to which the provision relates. In *Sanderson v Attorney-General, Eastern Cape*,³¹ the Court was dealing with an alleged breach of the right in respect of a particular trial. Moreover the profound difficulty which pre-conviction delays present to a court was stressed.

In the case of pre-conviction delays, three kinds of interests should be regarded as protected: trial-related interests, liberty and security. Trial-related prejudice refers to prejudice suffered by accused mainly because of witnesses becoming unavailable and memories fading as a result of delay, in consequence whereof such accused may be prejudiced in the conduct of their trial.[51]

[52] Of particular importance in the pre-conviction stage of the trial is the prejudice suffered by accused to their liberty and security (dignity) interests, features as stressed by Kriegler J in *Sanderson*.³²

Despite being presumed innocent, the accused is subject to various forms of prejudice and penalty merely by virtue of being an accused, because many in the community pay little more than lip service to such presumption of innocence. “*Doubt will have been shown as to the accused’s integrity and conduct in the eyes of family, friends and colleagues.*” Although **Sanderson** was concerned with the application of section 25(3)(a) of the Interim Constitution, which guarantees the right “*to a public trial before an ordinary court of law within a reasonable time of having been charged,*” the principles enunciated in that judgment are of equal application to the right protected by section 35(3)(d) of the present Constitution.

[53] When applied to the post-conviction stage of the trial the prejudice suffered by the accused in respect of liberty and security (dignity) interests of the nature above described, while not totally absent, is significantly reduced. There is the possibility that the accused may ultimately succeed on appeal, but the presumption of innocence, which lies at the heart of pre-conviction prejudice, is absent and it is for the accused to establish, in any appeal, that the conviction should be set aside.

³¹ See footnote 37.

³² Supra.

H Foreign Languages

3.21 Most of the foreign people (whether legal or illegal foreigners), communicate in the local languages while in South Africa. Others are married to or have partners with South African citizens and normally communicate with their spouses or partners in local languages. Once they are arrested, they want to make use of languages from their countries of origin necessitating the need for an interpreter who speaks a language from their country of origin. Some foreign interpreters may be obtained with ease while certain foreign interpreters will have to be sourced from far places and while the search of such interpreters is being conducted, the case will be postponed.

3.22 Sections 34 and 35 (1)(k) of the Constitution of the Republic of South Africa³³ states that everyone accused of a crime, has the right to a fair trial, which includes the right to be tried in a language that the accused person understands, or, if that is not practicable, to have the proceedings interpreted in that language.

3.23 The first right means that an accused has the right to have the proceedings conducted in a language that he or she understands. This right applies when the accused cannot understand the languages in which the court usually conduct its proceedings.

3.24 This right contains two important qualifications, that is, the right relates to a language that the accused understands and not prefers. In *Mthetwa v De Bruin*,³⁴ the court stated that Section 35(3)(k) of the Constitution does not give the accused the right to have a trial conducted in the language of his or her choice. The section merely confers a right to be tried in a language that he or she understands or to have the proceedings interpreted into such a language.

3.25 In order to comply with the constitutional obligation for an accused to understand the proceedings in a criminal court against him or her, the court has an obligation to assess whether the accused is capable of understanding court proceedings.

³³ Act 108 of 1996.

³⁴ In *Mthetwa v De Bruin* NO 1998 (3) BCLR 336 (N).

I Late Arrival of Prisoners at the Courts

3.26 It happens frequently that accused persons who are brought to court from local prisons arrive late. The impact late arrivals results in courts not starting timeously. This may be addressed administratively rather than by legislation.

J Conclusion

3.27 Most systemic delays are caused by dereliction of duties on the part of the officials. A clear example of dereliction of duties is the non-observance of official court hours. While some of the systemic causes are due to resource limitations. It is recommended that in order to avoid delays arising from a power failure, the authorities should provide for alternative power sources such as generators. With regard to water shortages, it is recommended that water tanks be provided at the court houses.

CHAPTER 4: DELAYS OCCASIONED BY THE HOLDING OF INTERLOCUTORY APPLICATIONS AND PARALLEL RIGHTS TO APPEAL

A Introduction

4.1 This topic will be divided into two sub-topics. The first sub-topic will focus specifically on delays caused by the holding of interlocutory applications. The second sub-topic will focus on delays caused by the parallel right to appeal.

4.2 An interlocutory application is a provisional or temporary application that is brought to obtain an order that is issued while the main case is still ongoing or before the final resolution of the main case. In criminal matters there are interlocutory applications which may be brought even before the start of the main case and those that may be brought during the hearing of the main case.

4.3 Interlocutory applications in South African criminal courts may have a significant contribution towards delays in the finalisation of the main case.

B Interlocutory Applications Prior to the Start of The Main Case

4.4 This type of applications stands out as the main obstacle(s) to the commencement of the main trial. This type of application(s) may or may not be dispositive of the main case. This type of applications may include a lack of jurisdiction of the court, and applications for a postponement, staying of criminal proceedings (permanently or temporarily).³⁵ The other example on this type of application is *Rodrigues v National Director of Prosecution of Southern Africa and Others*.³⁶

³⁵ *Mark Van Veen v Director of Public Prosecutions, Western Cape and Two Others Case 2280/2022* delivered on 31 July 2023.

³⁶ 2019 (2) SACR 251 (GJ) delivered on 3 June 2019.

C Interlocutory Applications during the Trial

4.5 This type of applications are made during the hearing of the case, but before the final judgment. These applications are for the purpose of resolving preliminary issues arising during the trial. They do not deal with the ultimate question of guilt or otherwise of the accused.

4.6 Examples of these applications are:

- Applications to challenge the admissibility of evidence.
- An accused might during the trial apply for bail or the prosecutor may apply for the cancellation of bail where the accused violated his or her bail conditions.
- Postponement may be applied during a trial usually by both the prosecutor and the defence where crucial witnesses are absent.
- Application may be made for the recusal of the presiding officer especially where his/her conduct causes the accused to believe that he or she may not be impartial.
- Applications related to the changing of legal representations. An accused person might apply to change his or her current lawyer.

D The Impact of Interlocutory Applications on the Main Case

4.7 Interlocutory applications usually cause delays in the finalisation of the main case. These applications, while necessary for procedural fairness or to prevent irreparable harm, may require separate hearings resulting in the stretching out of the time to finalise the main case.

1 Detailed breakdown of interlocutory application:

4.8 These applications usually have the following effect.

2 Prolonged proceedings

4.9 Pending the outcome of interlocutory applications, a criminal trial might not commence for a considerable long period. In **S v Zonke**,³⁷ as an example, 20 accused persons appeared in the High Court on 2 December 2015 for the purposes of a pre-trial conference. A period of seven years lapsed, and the trial did not commence. The status of this criminal trial was that the State was not ready to proceed with the trial pending the outcome of the review application. The Judge ended up removing the matter from the roll.

3 Potential for Abuse

4.10 The defence may use interlocutory applications as a strategy to delay the trial. This will usually happen even where the applications are without merit. In **Zuma v Downer and Another**,³⁸ the Supreme Court of Appeal observed that that the appeal did not truly raise any issues that truly deserved the attention of the court. There were no real questions of law involved in that appeal. The court also mentioned that the applicant's exercise of his right to appeal had the result that other cases of greater complexity and which truly deserved the attention of the court were made to compete for a place on the court roll with a case that lacked merit. This research paper has made proposals in the new Section 342C in Chapter 7 to deal with similar situations.

4.11 In **Maughan v Zuma**,³⁹ the court observed that the private prosecution was an abuse of process. The respondent's private prosecution meant that the accused came to court with "**unclean hands**". Consequently, the court found that the respondent's private prosecution was an abuse of the court process. The court said such conduct must be sanctioned.

4.12 In **President of South Africa v Zuma and Others**,⁴⁰ the court said that the private prosecution constituted an abuse of the process.

³⁷ *S v Zonke & Others* (CC 30/15)(2023) ZANWITC 31 delivered on 10 March 2023.

³⁸ 2024 (1) SACR 589 (SCA) delivered on 13 October 2023 at para 22.

³⁹ 2023 (5) SA 467 KZP at para 96.

⁴⁰ 2024 (1) SACR 32 (GJ) delivered on 5 July 2023 at para 149.

4 FOCUS ON COLLATERAL ISSUES

4.13 In criminal cases, collateral issues are those matters which are not directly related to the main case but can still have sufficient consequences for the accused. Put differently, collateral issues are those issues that are not the central focus of the criminal case itself but are nonetheless connected to the outcome of the case itself.

4.14 An example is the decision in the criminal case of ***Cupido v The State*** in the Supreme Court of Appeal,⁴¹ where one accused pleaded an alibi. The State called on a number of witnesses on collateral issues and not on the issue of identification.

4.15 Another example of collateral issues is ***Director of Public Prosecutions and Another v Netshidzivhe and Others***.⁴² The case revolves on whether evidence obtained during investigations was gathered in an improper or unfair manner. This involves the concept of collateral issues because the court is asked to determine if the manner of obtaining evidence, which is a collateral matter, would affect its admissibility in the main case. This may lead to the delay in the main case.

5 Separate Hearing

4.16 Some interlocutory applications may be complex, requiring detailed arguments and evidence to be properly resolved. This may lead to delaying the main case.

6 Appealability or Reviewability of Interlocutory Applications

4.17 Interlocutory applications may be appealable or reviewable. An example may be an application for the recusal of the magistrate which may be subjected to a review by the High Court.⁴³ This may cause a delay in the main case.

⁴¹ *Cupido v The State* (1257/2022)(2024) ZASCA 4 delivered on 16 January 2024.

⁴² (HCAA 08/2024)(2025) ZALMPPHC 20 delivered on 10 February 2025.

⁴³ Section 22 Act 10 of 2013.

7 Conclusion and Recommendations to avoid delays

(a) Firm Case Management When Dealing With Interlocutory Applications

4.18 Courts need to manage cases strictly and should ensure that interlocutory applications are dealt with efficiently and should not tolerate flimsy reasons for delaying court proceedings.⁴⁴

8 Parallel Rights to Appeal

(a) Introduction

4.19 Parallel appeals refer to situations where a litigant pursues two separate appeals at the same time in the same matter, usually in different courts. A party may, for example, pursue an appeal to the Supreme Court of Appeal while also pursuing an appeal to a full court of a High Court.

(b) Different Courts Hearing Same Issue

4.20 Two appeal processes involving the same issue are simultaneously taking place in two different courts. The recent matter involving the late Zambian President Mr Edgar Lungu's final place of burial may be an example of parallel appeals. After the full court in the Gauteng Division of the High court in Pretoria ruled against the wishes of the former Zambian President, the family applied for direct access to the Constitutional Court while at the same time applying for leave to appeal before the full Court over the same issue.

(c) Leave to Appeal should be applied for

4.21 Leave to appeal may only be granted where the Judge or Judges are of the opinion that the appeal would have reasonable prospects of success or where there are other compelling reasons to hear that appeal.⁴⁵

⁴⁴ S v Seth (5533-2022)(2024) ZAGPHJC 962 delivered 26 September 2024.

⁴⁵ Section 17(1)(a) Act 10 of 2013.

(d) The General Rule regarding Appealability of Interlocutory Orders

4.22 The general rule is that decisions which are of a preparatory or procedural character are not appealable mainly because those decisions are not considered final judgments.⁴⁶ The reason for this general rule is that piecemeal consideration of cases should be discouraged.

4.23 According to the decision in Zweni's case, the importance of this factor has somewhat diminished in recent times. The emphasis is rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute.

4.24 In *Takata South Africa (Pty) Limited v Competition Commission of South Africa and Others*,⁴⁷ the Competition Appeal Court said that interlocutory rulings, including rulings on exceptions are ordinarily not appealable, primarily because they are interim in nature.

4.25 The test of the appealability of an interlocutory decision has since advanced following the judgment in *United Movement and Another v Labasne Investment Group (Pty) Ltd*.⁴⁸ At the moment the test of appealability is the interest of justice and no longer the common law test as set out in *Zweni v Minister of Law and Order of the Republic of South Africa*.⁴⁹ The appealability of an interlocutory application was revisited by the Supreme Court of Appeal in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) LTD and Others*.⁵⁰

4.26 The Supreme Court of Appeal considered its previous decisions and the principles in those cases from which it was not ready to depart. The Supreme Court of Appeal said that it now has to be accepted that a dismissal of an exception save where the exception is a challenge to the jurisdiction of the court does not finally dispose of the issue raised.

⁴⁶ *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA S23 (A) delivered 20 November 1992 at para 8.

⁴⁷ (252/CAC/ Feb 24)(2025) ZACAC 1 delivered 16/1/25 at para 27.

⁴⁸ 2023(1) SA 353 (CC) delivered 22 September 2022 at para 37.

⁴⁹ *Supra*.

⁵⁰ 2023(5) SA 163 SCA delivered on 5 May 2023 at para 10.

(e) Why are Parallel Appeals Discouraged?

4.27 Parallel appeals may cause significant delays in the finalisation of the main case due to piecemeal litigation. Parallel appeals may divert the necessary resources away from the main the case. The fragmentation of the case through appeals on interlocutory matters may lead to a prolonged and inefficient resolution of the case.

4.28 In *Ewels v Francis and Others* (leave to appeal),⁵¹ the High Court said it is not in the interest of justice to have piecemeal adjudication of litigation, with the unnecessary delays resulting from appeals on issues, which would not finally dispose of the litigation.

(f) Detailed Breakdown of the problems caused by Parallel Appeals

i. Multiple Proceedings On The Same Issue

4.29 Multiple appeals on the same issue leads to the courts handling separate proceedings simultaneously. This will add more workload.

ii. Potential For Conflicting Decisions

4.30 Different courts may rule differently, resulting in further litigation and delays to resolve the inconsistencies.

iii. Resources Get Stretched Out

4.31 Multiple appeals will require more personnel than a single appeal. This will divert resources from other needy matters.

iv. Backlogs On The Court Roll

4.32 Increased court backlogs.

v. Conclusion And Recommendations To Mitigate Delays Caused By Parallel Appeals.

4.33 In order to deal with delays caused by interlocutory applications the following steps are suggested:

⁵¹ (6497/2022)(2025) ZAWCHC 113 delivered on 17 March 2025 at para 10.

(aa) STAMP OUT MERITLESS APPLICATIONS AND REMANDS

4.34 The court should be able, in the interest of justice, to refuse unreasonable delays caused by the parties who frequently ask postponements pending interlocutory applications. In **S v Mdluli and Others**,⁵² the court refused to grant further postponement pending the finalisation of a review application pending the commencement of the main case. The court also found that the continued delay to start the trial was unreasonable and refused the postponement request.

(bb) STRICT ADHERENCE TO TIMELINES TO FINALISE INTERLOCUTORY APPEALS

4.35 In **S v Mdluli**,⁵³ the court **having found that** the continued delay prevented the trial to commence, the court made an order that all the accused must finalise all interlocutory applications they intend to bring before the trial date set for the main case.

(cc) THE WEIGHING OF THE INTEREST OF THE ACCUSED AGAINST THE INTEREST OF THE ADMINISTRATION OF JUSTICE

4.36 In **S v Seth**,⁵⁴ the crisp question was whether a criminal trial can commence whilst a review application is pending. The review application was a challenge on the decision to prosecute the accused by the National Director of Public Prosecutions. The court observed the commencement of the criminal trial pending the outcome of the review can lead to witnesses forgetting crucial details or becoming unavailable due to death. The court also considered that previous postponements were caused by the accused, which also contributed to the delay.

4.37 The court further observed⁵⁵ that the right to a fair trial is not only concerned with the accused's rights, but also the rights of the public. The court refused the

⁵² (CC3/2021)(2024) ZAGPPHC 381 delivered on 10 April 2024.

⁵³ Supra.

⁵⁴ Supra at para 72 and 73.

⁵⁵ At para 73.

postponement and the review outcome and postponed the matter for the trial to commence. In the proposed new Section 242C, this research paper made recommendations to deal with similar situations .

CHAPTER 5: DELAYS CAUSED BY THE IN PERSON COURT APPEARANCE/ATTENDANCE OF WITNESSES AS OPPOSED TO VIRTUAL COURT APPEARANCE

A Introduction

5.1 Physical court appearances and video conferencing have both advantages and disadvantages for legal proceedings with in person court appearances. The court is able to observe the body language and demeanour, which may be crucial when determining credibility.

5.2 Video conferencing offers cost and time savings. Video conferencing is helpful for witnesses who are vulnerable such as young children testifying in sexual assault cases and witnesses who are very old to travel to the courthouse.

B Evidence By Means of Closed Circuit Television or Similar Electronic Media in South Africa

5.3 5.2.1. The Criminal Procedure Act,⁵⁶ provides that a court may, on its own initiative or on application by the Public Prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, give evidence by means of a closed circuit television (CCTV) or similar electronic media. Thus, courts are empowered by Section 158 (2) to order that a witness or an accused give evidence by means of CCTV.

5.4 The Criminal Procedure Act further provides that a court may make such an order only if the facilities are readily available or obtainable and if it appears to the court that to do so would –

⁵⁶ Section 158(2) of the Criminal Procedure Act 51 of 1977 as amended.

- (a) prevent unreasonable delay,
- (b) save costs,
- (c) be convenient,
- (d) be in the interest of the security of the State or public safety or in the interest of justice or the public, and
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

5.5 Thus, the general rule, under Section 158(1) of the Criminal Procedure Act read with Section 35(3)(e) of the Constitution, is that the trial of the accused has to take place in his presence.

5.6 Section 159 of the Criminal Procedure Act embodies express exceptions to that general rule (i.e. circumstances in which criminal proceedings may take place in absence of accused). Jurisprudence emanating from South African courts and the drafting history of the Criminal Procedure Amendment Act suggest that Section 158(2)-(4) creates an exception to the general rule under Section 158(1) and Section 35(3)(e) of the Constitution, that the trial of the accused has to take place in his presence. The accused's or witness's consent is a prerequisite for Section 158 (2)-(4) to be applied.

C Recent Amendment of Section 158 of the Criminal Procedure Act, 51 of 1977

5.7 Section 158 of Act 51 of 1977 was further amended.⁵⁷ In its current form Section 158(2)(a) of the Criminal Procedure Act allows a witness whether that witness is in South Africa or outside, to give evidence by means of CCTV or electronic media.

5.8 Section 158(6) of the Criminal Procedure Act was inserted into the Criminal Procedure Act.⁵⁸ Section 158(6) now clearly provides that a witness who is outside the Republic and who gives evidence by means of CCTV or similar electronic media should

⁵⁷ Section 6(a) Act 12 of 2021.

⁵⁸ Section 6(b) Act 12 of 2021.

be regarded as a witness who was subpoenaed to give evidence in court. The Superior Courts Act⁵⁹ has a similar provision.

D Video and Audio Evidence in Other Jurisdictions

1 Canada

5.9 The **Canadian Criminal Code**⁶⁰ provides that a court may make an order that a witness in Canada may give evidence by audio conference or video conference, if the court is of the opinion that it would be appropriate having regard to all the circumstances which includes:-

- a) the location and personal circumstances of the witness;
- b) the costs that would be incurred if the witness were to appear in person;
- c) the nature of the witness's anticipated evidence;
- d) the suitability of the location from where the witness will give evidence;
- e) the accused's right to a fair and public hearing;
- f) the nature and seriousness of the offence; and
- g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order that the evidence be given by audio conference.

5.10 The Canadian law permits video and audio conferencing. Video conferencing enables the parties at different locations to see and hear each other while audio conferencing enables multiple people to connect and communicate simultaneously over the phone or internet.

5.11 The South African legislation does not include audio conferencing.

⁵⁹ Section 37C Act 10 of 2013.

⁶⁰ Section 714.1 Criminal Code 1985.

2 Australia

5.12 Legislation in Australia⁶¹ allows the court or a Judge, for the purposes of court proceedings, to direct or allow testimony to be given by video link, audio link or other appropriate means. The conditions for the use of video links, audio links or other appropriate means are set out in the legislation.⁶²

(a) Video Link

5.13 The court or Judge must not exercise the use of video link unless the court or Judge is satisfied that the following conditions are met:-

- (a) The court room or other place where the court or Judge is sitting is equipped with facilities that enable all eligible persons present in that court room or place to see and hear the remote person who is giving evidence by way of the video link.
- (b) The second requirement is that the place at which the remote person is located is equipped with facilities that will enable all eligible persons present at the court room or other place to see and hear each eligible person where the court or Judge is sitting.

(b) Audio Links

5.14 The court or Judge must not exercise the use of audio link unless the following conditions are met.

- (a) Firstly, the court room or other place where the court or Judge is sitting is equipped with facilities like loudspeakers that enable all eligible persons present in the court room or other place to hear the remote person who is giving evidence.
- (b) Secondly, the place at which the remote person is located is equipped with facilities like loudspeakers that enable all eligible persons present in that place to hear each eligible person present in that court room or other place.

5.15 Eligible persons are such persons as the court or Judge may consider should be treated as eligible persons for the purpose of the proceedings in question.⁶³

⁶¹ Federal Court of Australia Act 1976 – Section 47A(1).

⁶² Section 47(C) of the Federal Court of Australia Act 1976 – section 47(e).

⁶³ Section 47(c)(b) of the Federal Court of Australia Act 1976.

3 Pennsylvania State in the United States of America

5.16 In Pennsylvania, the preservation of testimony through video recording is governed by the rules.⁶⁴ Rule 4017.1 provides that any deposition upon oral examination may be taken or recorded by video tape by means of simultaneous audio and visual electronic recording.

5.17 A video deposition may be used in court if accompanied by a transcript of the deposition. Rule 1381 provides that when the testimony of a witness is taken by means of video recording, the testimony shall be recorded simultaneously by a stenographer. The court and the persons shall identify themselves on camera. The witness shall be sworn. The original video shall not be altered.

4 Advantages of Evidence by Means of Closed-Circuit Television or Similar Electronic Media in SA

5.18 The following advantages of evidence by means of CCTV or similar electronic media have been cited / identified as follows:

(a) *May Avoid Unnecessary Delays*

5.19 In a recent decision heard at the High Court in Johannesburg,⁶⁵ the judge found that allowing the witness to testify from Italy via video link prevented unnecessary delays rather than ensuring that the witness should travel to South Africa, which would have wasted more time and created more delays in finalising the matter.

(b) *May Minimise Costs*

5.20 Allowing a witness to testify via video link will minimise the expenses the State will incur to pay for flights and accommodation costs to and from South Africa and the other countries outside South Africa.⁶⁶

⁶⁴ Pennsylvanian Rules of Civil Procedure 4017.1 and 1381.

⁶⁵ *State v Nthai* (Interlocutory Application) (5533/2022)(2024) ZAGPJHC 1178 delivered 7 November 2024 at para 31.

⁶⁶ *State v Nthai* (Supra) at para 31.

(c) May Prevent Secondary Trauma Of Witnesses

5.21 A child witness who testifies in an open court facing his or her tormentor in court will be subjected to secondary trauma. In **State v Sindane**,⁶⁷ the Judge remarked that testifying through a CCTV would make the child witness free and comfortable to testify from a room separate from the court room rather than facing the accused (**his or her tormentor**).

5 Requirements of Application in terms of Section 158(2) of the Criminal Procedure Act

5.22 In the matter of **S v Lenting and Others**,⁶⁸ the court dealt with evidence of a witness via CCTV. The adult witness was too traumatised to testify in open court after observing a gang-related murder accused. The court noted that exposing the witness to aggressive cross-examination by the accused in such circumstances was not in accordance with the proper administration of justice.

5.23 In support of the application, the State tendered a report by a clinical psychologist confirming that the witness appeared to be suffering from anxiety and reported experiencing symptoms of a panic attack when recounting the crime she witnessed. She was also in the early stages of pregnancy, which would make the process of testifying in court more traumatic for her.

5.24 The investigating officer noted that the witness was terrified that her identity would become known, resulting in severe security implications for her and her minor children. The ninth accused opposed the application and contended that, during consultations, his legal representative had shown him the statement where the name of the witness in question appeared, and it would therefore serve no purpose for the relief to be granted. It was also argued on his behalf that the court should not be readily inclined to grant the application, as this was not a sexual offence matter. The court considered the applications under the two sections, namely 153 and 158 jointly.

⁶⁷ *State v Sindane* (CC 166/04) 2008 (NWHC) 34 delivered 12 September 2008.

⁶⁸ *S v Lenting and Others* 2023 (2) SACR 409 (WCC).

5.25 *The court held* that, in many instances' Sections 153 and 158 of the Criminal Procedure Act had been invoked in sexual offence cases, as well as in cases involving minor children, but the application of these sections were not limited to such. They applied with equal force to adult witnesses whose evidence was likely to be compromised by fear or distress about testifying in an open court, or in the accused's presence. (See paragraph [18].)

(a) *May Save Time and Travel Costs / Travel / Accommodation Expenditure*

5.26 To mitigate or avoid delays in court proceedings, video testimony may be used allowing witnesses to give evidence remotely via CCTV or similar electronic media. This approach may help avoid unreasonable delays, save costs and provide convenience to all parties involved. There must be assurance that the technology is reliable and does not impede the witnesses' ability to communicate. Some of the elderly people reside in very remote areas without reliable transport. A trial may be delayed due to the elderly witness being unable to arrive in court to give very crucial evidence.

6 *May Prevent Court Delays Caused by Non-Availability of Expert Witnesses*

5.27 Frequently, expert witnesses are unable to attend trials due to their tight schedules. They may be in high demand due to their scarce skills or due to the limited number of experts available. These factors exacerbate delays in courts causing backlogs that are detrimental to all stakeholders. It is submitted that expert testimony through virtual platforms may prevent unnecessary postponements and may expedite the finalisation of trials.

(a) *Concerns*

5.28 Are the rural areas sufficiently covered by networks so as to enable the witness(es) to testify remotely by means of virtual platforms like MS Teams/Zoom, etc?

5.29 Means to safeguard the witness testifying remotely (practical guidelines – when for instance the witness testifies remotely, and the interpreter is based in another area)?

5.30 Availability of virtual interpretation rooms/establishment of such rooms? (guidelines to be developed).

5.31 In instances of sign language interpreters being used – are these virtual platforms catering for them? Is the software uploaded on computers so that the witness/complainant, the Public Prosecutor, the accused, the legal practitioner and the court are able to follow the proceedings?

7 May Enhance the Safety of Witnesses especially in High Profile Cases

5.32 It happens, especially in high profile cases involving organised crimes or politically motivated cases, that witnesses come to court escorted by police. Video testimony can enhance witness safety by allowing such witnesses to testify remotely in order to shield them from intimidation or harm.

8 Video may be Fair to the Accused as well

5.33 Video testimony in court usually raises concern to the accused and his lawyer who might prefer the witness to be physically present in court. The witness, while testifying through video link, is visible to all involved in the case. The court and all involved in the case may be able to observe a witnesses' demeanour and body language. There is thus fairness to the accused and his or her lawyers.

9 The Constitutional Right to Challenge Video Evidence

5.34 In South African law, the accused has a fundamental right to challenge all evidence presented against him or her. Video footage is considered real evidence and its admissibility is subject to strict requirements, primarily concerning its authenticity, relevance and integrity.

(a) *The Right to Challenge Video Evidence*

5.35 The right to challenge video evidence stems from the constitutional right to a fair trial,⁶⁹ which includes the right to adduce and challenge evidence. When video evidence is introduced the accused may:

i. Demand Disclosures

5.36 The accused must be given access to the footage and related data in advance to prepare for his/her case.

ii. The Accused May Scrutinise The Chain Of Custody

5.37 The accused may question the person who recorded the footage, how it was stored, and who had access to it from the moment it was captured until the trial. A broken chain of custody can render the evidence inadmissible.

(b) *The Accused May Request Expert Testimony*

5.38 A digital forensic expert may be called to examine the footage for sign of manipulation, deep fakes or technical flaws.

(c) *Cross Examination*

5.39 The person who made the video evidence recording or a forensic analyst must be available for cross examination to test the reliability and authenticity of his/her testimony.

(d) *Trial Within A Trial*

5.40 If the admissibility of the video evidence is disputed, a trial within a trial (a mini hearing) may be held to determine whether the evidence meets the legal standards of admission or not.

(e) *Disadvantages of Audio Conferencing*

5.41 As already indicated above, some jurisdictions do allow audio conferencing as a method of testifying. Audio conferencing has a number of disadvantages.

⁶⁹ Section 35(3) Act 108 of 1996.

5.42 Firstly, other than hearing the witnesses' voice, the remote witness cannot be seen. Secondly the court cannot observe his or her demeanour or body language which is crucial to determine credibility.

E Conclusion And Recommendation

5.43 In suitable situations, video testimony may be a useful tool. It may get cases moving forward more quickly and reducing backlogs in the courts and reducing overcrowding in our jails.

5.44 It is recommended that a legal framework or rules be introduced to govern the use of video testimony and also ensuring the integrity of the video proceedings.

CHAPTER 6: PRE-TRIAL CONFERENCES TO CURTAIL CRIMINAL PROCEEDINGS

A Introduction

6.1 A Pre-trial conference in criminal matters is a court-scheduled meeting of the prosecution and defence to streamline the case by exchanging evidence and narrowing disputed issues. The aim is to resolve the case efficiently and ensuring readiness for a swift trial, often involving disclosure of evidence and witness lists. It helps to identify the agreed-upon facts, which will limit unnecessary evidence and thus preventing delays in the commencement and conclusion of criminal trials.

B The Purpose of Pre-Trial Conferences in Criminal Matters

6.2 Pre-trial conferences narrow down what needs to be proven at the trial.

6.3 Pre-trial conferences explore the possibility of plea agreements to resolve the case without a full trial.

6.4 Pre-trial conferences ensure that both parties to a criminal trial have the necessary documents for trial purposes and thus eliminating delays in the commencement and conclusion of criminal trials.

6.5 Pre-trial conferences confirm the trial readiness of the parties reducing wasted time to have a criminal trial commence and be concluded without undue delay.

C Key South African Sources and Legal Frameworks

6.6 The Constitution of the Republic of South Africa Act ⁷⁰enshrines the need for efficient case management including pre-trial processes.

6.7 Criminal Procedure Act provides the statutory foundation, including provisions for admission of guilt fines⁷¹ and the less-used preparatory examinations.⁷²

6.8 Court Rules and Practice Directives such as Practice Directive 41, formalise pre-trial procedures, mandating trial readiness certification.

6.9 The common law develops procedural aspects not fully covered by statute.

6.10 Presently, in the South African context, pre-trial conferences are viewed as a judicial case management mechanism to address the logistics of a case, hopefully allowing for the more efficient allocation of court time and resources.

6.11 It has become common for Judges President of the various Divisions to issue practice directives providing for pre-trial hearings. For the Regional Courts, the Regional Court Presidents adopted the Criminal Court Practice Directives⁷³ which provide wide ranging measures for consideration at the pre-trial hearing which include the following:

- Whether the prosecution is ready to proceed to trial?
- Whether the accused/defence is ready to proceed to trial?
- Whether the accused person is legally represented and in the case of a private practitioner, whether the legal representative has sufficient funds or acceptable financial arrangements for the duration of the trial.
- Whether the legal representative has received copies of the final charge sheet, further particulars (if any), a copy of the docket/statements and all evidentiary material intended to be used by the prosecution at the trial.

⁷⁰ Section 35 Act 108 of 1996.

⁷¹ Section 57 and 57A.

⁷² Chapter 20 Act 51 of 1977.

⁷³ Criminal Courts Practice Directives for Regional Courts in South Africa 2023 7th Revision

- Whether the prosecution has consulted with all relevant witnesses and that there is no outstanding investigation or evidence.
- Whether the legal representative has consulted with accused person.
- Whether there is any evidence of a technical nature. This may include, for example, admissions or confessions, pointing out by the accused person, forensic evidence, expert testimony or statements in terms of section 212 of the Criminal Procedure Act, 51 of 1977 (CPA) or other documentary evidence.
- Whether there are any other outstanding issues that must be dealt with, what these are and how and when it will be dealt with.
- Whether any foreign language interpreters or other specific interpreters are necessary and whether any arrangements have been made. The court must conduct an inquiry to determine the language the accused understands (as provided in Section 35(K) of the Constitution read with Section 6(2) of the Magistrates Court Act, 32 of 1944) and not simply enquire about the mother tongue or preferred language of the accused .Such enquiry must be mechanically recorded and the findings must be recorded in writing.
- Whether the appointment of assessors is necessary?
- The estimated duration of the trial and proposed trial dates.
- When setting the matter down for trial , steps must be taken to determine the number of days and time that will be required for the matter to be finalised.
- Every attempt should be made to allocate a continuous roll during which the matter could be tried to completion.
- Where the matter cannot be placed on a continuous roll, the matter should be staggered over a number of days sufficient to cover the determined trial days.
- Where any of the issues have not been answered satisfactorily , the judicial officer may postpone the case to a later date for a further pre-trial hearing and may give specific directions to the parties.

6.12 This chapter investigates the extent to which these mechanisms may be legislated to in order expedite criminal proceedings.

D Other Jurisdictions

6.13 The Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.⁷⁴ The right to have a criminal trial commence and concluded without undue delay is enshrined in the Bill of Rights.⁷⁵

6.14 The American jurisdiction has an established system of pre-trial conferences in criminal proceedings. In terms of Rule 17.1 of the Federal Rules of Criminal Procedure:

On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference.⁷⁶

6.15 In adversarial systems pre-trial conferences in criminal matters are less preferred as they seem to be in conflict with the core adversarial principles where the state and the defence present their case before an impartial arbiter. In many adversarial systems, full evidence disclosure is not required until the trial, making it difficult to negotiate effectively beforehand.

6.16 Pre-trial conferences are vital in inquisitorial systems as to ensure efficiency and truth-seeking by allowing judges to actively manage cases, narrow issues, and filter evidence before trial. Germany and Spain are examples of inquisitorial system where judges also gather evidence, question witnesses, and complete many other responsibilities that are normally left to lawyers in an adversarial system.

6.17 The Namibian Criminal Procedure Act of 2004⁷⁷ sought to revamp its South African-based Criminal Procedure Act (CPA) by introducing elements of the inquisitorial system into its criminal procedural law. Included among these were the far-reaching pre-trial conference provisions which would have enabled judges to gather evidence to narrow issues ahead of the commencement of the trial. However, the Act was never promulgated. The latter Act was formally repealed by the Criminal Procedure Act Repeal

⁷⁴ Section 39(1)(c) Act 108 of 1996.

⁷⁵ Section 35(3)(d) Act 108 of 1996.

⁷⁶ Rule 17.1 of the Federal Rules of Criminal Procedure.

⁷⁷ Criminal Procedure Act of 2004 (Namibia).

Act in 2018⁷⁸ thus retaining the Criminal Procedure Act 51 of 1977 as the applicable legislation in Namibia.

E Conclusion and Recommendation

6.18 In the South African context it has become common to regulate pre-trial hearings through practice directives. Practice directives provide opportunities for every Division of the High Court or a Regional Court Division to address matters that are peculiar to the Division or Regional Court Division concerned. However, legislating on key fundamental principles may be necessary to ensure uniformity.

6.19 Chapter seven provide for the extent to which pre-trial hearings may be incorporated into the judicial case management realm

⁷⁸ Criminal Procedure Act Repeal Act 14 of 2018

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS TO STAMP OUT UNREASONABLE DELAYS IN SOUTH AFRICAN CRIMINAL COURTS

7.1 Throughout this research paper we have tried to expose the consequences of unreasonable delays and the injustices caused to those who seek the speedy finalisation of criminal matters .In order to realise swift justice, it is recommended that new Sections 342B to 342H, as indicated below, be incorporated to the current Section 342A. In addition, it is recommended that a new Section 343 be introduced into the Criminal Procedure Act. The said new Section 343 will be headed: "**CASE PROGRESSION AND MANAGEMENT**" and will be discussed in detail under **Chapter 8**.

A Section 342B - Infusion Of Norms and Standards in Expediting the Pace of Proceedings

7.2 Consistent with the norms and standards issued by the Chief Justice in terms of Section 8 of the Superior Courts Act 10 of 2013 read with Section 165(6) of the Constitution issued on 28 February 2014 under government gazette No.37390 to which all judicial officers are obliged to comply therewith, finalisation of criminal cases shall be dealt with as follows:

(a) To give effect to an accused person's right to speedy criminal trial enshrined in section 35(3)(d) of the Constitution read with subsection(1)(d) thereof, every effort shall be made to bring the accused to trial as soon as possible after the accused's arrest and first appearance in court.

(b)The judicial officer must ensure that every accused person pleads to the charge within three months from the date of first appearance in the magistrate's court .To this end, the judicial officer shall strive to finalise criminal matters within six months after the accused pleaded to the charge.

(c) All judicial officers are enjoined to take pro-active stance to invoke all relevant legislation to avoid lengthy period of incarceration of accused persons while awaiting trial.

7.3 For purposes of subsection 7.1.1 above, no criminal matter shall be transferred from the magistrate's court to the regional or high court unless such matter is ready for trial and is enrolled for trial and not for further investigation or for postponement .

7.4 The control public prosecutor of a regional court or court roll planner of a division of a high court, shall ensure that when a matter is transferred from a magistrate's court and is enrolled on the regional court or high court roll, such a matter is enrolled for a plea and trial and not for a postponement or for a plea only.

7.5 It shall therefore be the responsibility of the of the regional court public prosecutor or high court roll planner to ensure that not many matters are enrolled in the regional or high court on the same day, which results in postponements becoming inevitable .

B Section 342C - Limitation to Several Postponements in Criminal Proceedings Without Judicial Inquiry

7.6 Many cases are postponed several times either at the request of the prosecution, defence or the accused without intervention of or inquiry by the court required to sanction the postponement and by so doing impede on the accused's right and that of the victim of the crime for a speedy trial and finalisation as enshrined in the Constitution.

7.7 To ensure that a speedy trial is not hampered by unwarranted postponements, no case shall be postponed for more than three times without judicial inquiry into the reason for not commencing with the trial or not transferring the case to a court having jurisdiction to try the case.

7.8 During the inquiry envisaged in subsection 7.2.2 the court the court may-

- (a) refuse to grant a further postponement in which case the provisions of section 342A shall apply;
- (b) summarily case manage the case and-
 - (i) set the time frames for certain actions to happen and postpone the case for not more than thirty days;
 - (ii) direct the parties to comply with the time frames by a specified date;
 - (iii) upon having managed the case, the court may certify the matter trial ready and then fix a trial date and the duration thereof.

7.9 Except in special and compelling circumstances, a criminal trial shall not be postponed on more than three occasions at the request of a single party to the trial.

7.10 On aggregate, such postponements shall not exceed 90 days if the trial is held in the magistrate's court or regional court.

7.11 If the trial is held in the High Court, such postponements shall not exceed 180 days on aggregate.

7.12 A criminal trial may not be postponed unless satisfactory reasons are advanced by the applicant for a postponement. All postponements should be granted for the shortest possible period and the proceedings must be fully recorded mechanically and reasons for such postponement must be adequately recorded .

7.13 The commencement or continuation of a criminal trial shall not be paused or prevented by the institution of any application brought by any party except where there are substantial and compelling circumstances for the trial to be paused or stopped.

7.14 The commencement or continuation of a trial referred to in 7.2.8 may be paused or stopped only by an order from a competent court which shall furnish full reasons for such an order. Such reasons shall include the substantial and compelling circumstances justifying the pausing or stopping of the trial.

7.15 An appeal against the refusal to pause or stop a criminal trial thereof shall have no effect on the commencement or continuation of the relevant criminal trial.

C Section 342D - Limitation to a Lengthy Duration of Postponement Pending Trial whilst Accused is in Custody

7.16 Many cases are postponed for a long period pending the completion of investigations or for trial even though such accused person might be in custody and contrary to the constitutional imperative for a speedy finalisation of criminal cases.

7.17 To avoid unnecessary lengthy period of postponement and incarceration of accused persons whilst waiting trial, a postponement of a case for trial or for investigation or finalisation of trial may not be for more than three months.

7.18 Should there be a request either by the prosecution, defence or the accused person for a postponement exceeding a period of more than three months, the judicial officer before whom such a request for a longer duration of postponement is made shall conduct an inquiry to establish whether to grant a postponement as requested or not.

7.19 In deciding whether to grant a postponement for a longer period, the court shall consider the following the following factors –

- (a) whether the accused is in custody;
- (b) if in custody, for how long such an accused person has been in custody;
- (c) whether the accused has been granted bail;
- (d) if the accused has been granted bail but unable to pay the amount fixed, the court shall conduct an inquiry to establish –
 - (i) whether the accused person can afford a reduced bail amount;
 - (ii) whether the accused can provide any form of security to ensure his or her attendance in court;
 - (lii) whether the accused can be released on warning with appropriate and achievable conditions; or
 - (lv) whether conditions under which the accused is detained including overcrowding, justify the release of the accused person whilst awaiting trial, or
 - (V) consider any other factor that serves the interest of the administration of justice.
- (e) If the accused person is in custody and no bail has been granted and it would not be in the interest of justice to release the accused person on bail or reconsider his or her release on bail, the court shall summarily conduct judicial case management conference to ensure that the trial proceedings are expedited or that the case is given preference.

D Section 342E - Guidance on Judicial Case Management in Criminal cases

7.20 As contemplated in paragraph 7.1 of the norms and standards referred to in subsection 7.1.1 of Section 342B, the following shall guide judicial officers in enhancing the objectives of the norms and standards set out in paragraph 7.1.1 thereof:

- (a) Case flow management shall be directed at enhancing service delivery and access to quality justice through speedy finalisation of all matters.
- (b) The National Efficiency Enhancement Committee chaired by the Chief Justice, shall co-ordinate case flow management at national level. Each province shall have only one Provincial Efficiency Committee, led by the Judge President; that reports to the Chief Justice.
- (c) Every court must establish a case management forum chaired by the head of that court to oversee the implementation of case flow management.
- (d) Judicial officers shall take control of management of cases at the earliest possible opportunity.
- (e) Judicial officers should take active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay.
- (f) The head of each court shall ensure that judicial officers conduct pre-trial conferences as early and as regularly as may be required to enhance the expeditious finalisation of cases.
- (g) No matter may be enrolled for trial unless it is certified trial ready by a judicial officer.
- (h) Judicial officers must ensure that there is compliance with all applicable time limits set out in section 342B, 342C and other time-lines relevant hereto set out in any law or during judicial case management conference in criminal matters.

7.21 If a matter is postponed for further investigation , for bail application or is postponed for any other reason than for trial , such a request for postponement shall be considered regard being had to the provisions of Section 342D.

E Section 342F-Trial Readiness Before Transfer of Criminal Matters from Magistrate's Court to the Regional or High Court

7.22 Request to transfer or for referral of a matter to the regional court or the high court as contemplated in Section 75(2) or Section 144 of the Criminal Procedure Act and in accordance with Section 342B, shall not be granted unless such a matter is ready for trial and arrangements have been made with the head of the court to which the matter is transferred to ensure the availability of a judicial officer to proceed with the trial as scheduled.

7.23 The magistrate's court requested to transfer a matter to the regional court or high court shall only transfer a matter after having instituted an inquiry to satisfy itself that the matter is indeed ready for the trial to proceed in the regional or high court on the date of trial and for the duration of the scheduled period.

7.24 During the inquiry in terms of 7.5.2, the magistrate court shall, before taking a decision whether to transfer the case, take into account the following factors, namely –

- (a) whether the investigation in the matter is complete;
- (b) whether all the witnesses have been subpoenaed and or are available;
- (c) whether the accused person(s) is or are legally represented by a private attorney or counsel, and if so;
- (d) ensure that the attendance of such attorney or counsel to confirm the instructions and his or her availability for the trial is secured before the matter could be transferred;
- (e) with regards to paragraph (d) herein ,confirmation of the instruction and availability for trial in the regional or high court, may be confirmed by way of a letter that is presented in court through the prosecution;
- (f) if the accused person is not legally represented, such an accused person shall be informed of his or her rights to be provided with legal representation at the expense of the State;
- (g) should the accused person elect to be provided with legal representation at the expense of the State ,as envisaged in paragraph (f) above , he or she shall with the assistance of the prosecution be referred to the local or nearest Legal Aid South Africa's office for assistance ;

(h) if the accused person qualifies to be represented at the State expense, an attorney or counsel so instructed to represent the accused shall attend court to confirm his or her instructions and his or her availability for the envisaged trial in the regional or high court, or

(j) any other factor which in the opinion of the court should be considered.

7.25 The provisions of 7.5.3 above, shall also apply to matters transferable in terms of Sections 115A, 144 and any other procedural provision dealing with the transfer of cases to the regional or high court.

7.26 After the inquiry in terms of 7.5.3 and the court is satisfied, it shall certify the matter trial ready and transfer the matter accordingly.

7.27 Should the court conducting the inquiry not be satisfied that the matter is trial ready, it shall case manage the matter and shall set the timelines to ensure trial readiness.

7.28 Once the matter is certified trial ready, the case shall then be transferred.

7.29 The certification of trial readiness and the record of the proceedings relating to the inquiry shall be filed with the registrar or clerk of the court to which the case is transferred.

7.30 On receipt of the record of the proceedings and certificate of trial readiness, the registrar or clerk of the court concerned shall immediately submit same to the head of that court or to any judicial officer so designated.

7.31 If the head of court or any designated judicial officer, is not satisfied that the case is trial ready, he or she shall case manage the case to ensure trial readiness well in time before the date of trial.

7.32 In addition to 7.5.10, each head of court may issue case management directives for effective and expeditious finalisation of criminal matters.

F Section 342G – Judicial Engagement at Case Management Conferences

7.33 At any judicial case management conference or at any inquiry for the speedy finalisation of a case and without limiting the scope of judicial engagement, the judicial case management judge shall-

- (a) explore factors that can enhance the speedy finalisation of criminal cases;
- (b) explore admissions provided that the defence is furnished with statements of all witnesses and documents contained in the docket except those marked as privileged or confidential.
- (c) require both the prosecution and defence or the accused to provide a list of witnesses that are intended to testify at the trial.
- (d) require both the prosecution and defence or accused person(s) to state in broad terms the nature of evidence of each witness they intend to call.
- (e) endeavour to promote agreement on limiting the number of witnesses that will be called at the trial, eliminating pointless repetition or covering facts already admitted;
- (f) endeavour to promote agreement on and avoid disputing facts or evidence that is overwhelming.
- (g) strive to make both the prosecution and the defence or accused person(s) to understand that denial of everything including overwhelming evidence may result in an adverse inference being drawn during the trial and or may serve as an aggravating factor during sentencing stage .
- (h) explore the possibility of referring the matter to alternative dispute resolution.
- (i) determine suitable trial dates and estimated duration of the trial .
- (j) consider any other matter germane to expediting the trial readiness of the case.

7.34 The record of the case management conference, any directions issued by the case management judge and the judge's record of the issues to be tried in the case, shall be included in the court file to be placed before the trial judge.

7.35 The judge's record referred to in 7.6.2 shall exclude any plea discussions and or admissions made without prejudice of rights unless the accused waves any such right.

7.36 The trial court shall be entitled to have regard to the documents referred to in 7.6.3 including the determination of any request for a postponement and further timelines to be set and complied within specified date.

7.37 Unless the prosecution and the defence or the accused person(s) agree in writing or during judicial case management conference and accordingly recorded, the case management judge and the trial judge shall not be the same person.

G Section 342H - Consequences for Failure to Comply with the Order, Directive and Timelines

7.38 The case management, through judicial intervention, shall be used in the interest of justice to alleviate congested criminal trial rolls and to address the problems which causes delay in the finalisation of criminal cases,

7.39 In addition, judicial case management process shall be used and applied in accordance with the principle that, notwithstanding the provisions of Sections 342A and 342G herein providing for judicial case management, the primary responsibility remains with the prosecution, defence and or the accused person(s) to prepare properly , comply with all relevant provisions in this Act or any other law and shall act professionally and diligently in expediting criminal cases towards trial and adjudication.

7.40 In the light of what is stated in 7.7.1 and 7.7.2 herein, any case management judicial officer may at case management conference or inquiry, make any order or directive against the prosecutor , legal representative of the accused, accused person(s) or any person(s) whose conduct has contributed unreasonably in frustrating the objectives of the judicial case management process.

7.41 Any person referred to in 7.7.3 herein shall **inter alia**, but not limited thereto, include those responsible for the delay in furnishing the investigating officers with fingerprint results, reports by the forensic laboratory referred to it in terms of Section 212 of the Act and reports on referral in terms of Sections 77, 78 and 79 of the Act.

7.42 Failure to comply with an order or directive as contemplated in 7.6.3 herein or any timelines set out by the judicial officer during case management inquiry or

conference may be reported to the relevant professional body for unprofessional conduct and or may institute an inquiry for possible contempt of court.

7.43 A trial judicial officer may at any stage of the proceedings also deal with a failure to comply with an order of court, directive or timeline as contemplated in 7.7.5 herein including its own order directive or timeline.

CHAPTER 8: RECOMMENDING THE INTRODUCTION INTO THE CRIMINAL PROCEDURE ACT OF A NEW SECTION 343 HEADED: *CASE PROGRESSION AND MANAGEMENT*

8.1 There is currently no Section 343 in the Criminal Procedure Act. It is recommended that the proposed new Section 343 should read as follows:

Criminal cases must be dealt with justly.

Dealing with criminal a criminal case justly includes-

- (a) acquitting the innocent and convicting the guilty ;
- (b) treating all participants with politeness and respect ;
- (c) treating the prosecution and the defence fairly ;
- (d) recognising the rights of an accused person , particularly those rights under section 35(3) of the Constitution of the Republic of South Africa ;
- (e) respecting the interests of witnesses and victims and keeping them informed of the progress of the case ;
- (f) dealing with the case efficiently and expeditiously ;
- (g) ensuring that appropriate information is available to the court when bail and sentence are considered ; and
- (h) dealing with the case in ways that take into account -
 - (i) the gravity of the offence alleged ,
 - (ii) the complexity of what is in issue ,
 - (i) the severity of the consequences for the accused person and others affected , and
 - (ii) the needs of other cases .

8.2 Each participant , in the conduct of each case . must –

- (a) prepare and conduct the case in accordance with the requirement that cases be dealt with justly ;
- (b) comply with the law , directives and orders made by the court ;

- (c) attend court when required to do so and at once inform the court if a participant may be or will be unable to attend and the reasons therefore ;
and
- (d) at once inform the court and all parties of any failure (whether or not that participant is responsible for that failure) to take any required procedural step if such failure would adversely impact the requirement that cases be dealt with justly ;

8.3 Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this section.

8.4 The court must further the requirement that cases be dealt with justly in particular when exercising any power given to it by legislation, when applying any directive and when making orders.

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